IN THE

# Supreme Court of the United States

October Term, 1964

No. 1147

FAIRFAX FAMILY FUND, INC., a corporation,

*Appellant,*

*vs.*

PEOPLE OF THE STATE OF CALIFORNIA,

*Appellee.*

## BRIEF FOR APPELLANT OPPOSING MOTION TO DISMISS.

### Summary of the Argument.

The argument in support of the motion to dismiss concerns itself with a challenge to the finality of the judgment, and, therefore, the jurisdiction of the Court. The difficulty with this part of the argument is that its major premise is based on a complete misinterpretation of *Richfield Oil Corp. v. State Board,* 329 U.S. 69. It ascribes to that decision a distinction of fact, and an implied holding as a consequence of that distinction, that were not made in it; and it ignores entirely the ultimate facts upon which the decision was based, as well as the existence in the case at bar of the same ultimate facts. Those ultimate facts are that the facts bearing upon the federal issue, which is determinative of the case, have been conclusively established in the case; the law of the case for the state courts has been

settled on that issue by the State's appellate courts; and so, there is nothing further to be decided there.

In view of that factual identity between this and the *Richfield* case, the latter's rationale is plainly applicable here. On the whole record and resorting to the local law fixing the effect of the law of the case upon future proceedings, the judgment, as on directly analogous facts it was held to be in *Richfield*, is final.

The contention that an appellate decision upon an issue raised and decided in connection with an application for a preliminary injunction is not the law of the case is flatly contrary to the rule established on that precise point by the State's highest court. Nor is it a correct or relevant premise in appellee's argument that a decision of a trial court in connection with such an application does not control that court's determination of the ultimate issue in the case. This contention confuses such an interlocutory and, therefore, changeable decision upon the issue involved in the application by a trial court, with an appellate decision passing upon the issue. The latter of necessity controls future disposition of the issue in the cause whenever it arises on the same facts.

Appellee's discussion of the substantiality of the question presented, as well as its restatement of the question, betrays the same disregard of the real and only issue in the case as has characterized appellee's strategy from the beginning of the case. [*Mo.*, 2, 12-21.[1]] By

[1]The Statement As To Jurisdiction is referred to in this brief by the abbreviation "*Juris. State.*"; the Motion To Dismiss by "*Mo.*"; and the appellant as "Fairfax." The briefs and petitions filed in the court below are found in the Record here and are referred to by their respective titles. [See, *Juris. State.*, 2 (footnote).]

substituting for the word "license" the word "regulate," appellee diverts the argument from the question whether a State may require its permission as a condition on the right or privilege of engaging in interstate commerce, to the question whether a State may regulate the local incidents of that commerce. Only the former question is or could be involved in the instant case.

Engagement in interstate commerce is not within the area of State control; regulation of local activity, even though arising from such commerce, is. The assertion that regulation of the mail-order small loan business is necessary, raises only a policy consideration for Congress. A State's impatience or dissatisfaction with that body's action or inaction does not give the State a power over interstate commerce withheld from it by the Constitution of the United States. Appellee's argument is based on *Robertson v. California,* 328 U.S. 440, but accurately read and analyzed that case is seen to be a local-regulation decision, not a case involving a State license as a condition of engaging in interstate commerce.

The assertion of violations by Fairfax of local regulatory conditions relating to solicitation representations and loan charges, is entirely irrelevant, being a matter not pleaded, raised or decided below, and not bearing upon the power to license engagement in interstate commerce, as distinguished from regulation of its localized incidents. It is, at any rate, without factual support. The solicitation material clearly made it known that a loan would be governed by the law of Kentucky; and the loan charges were substantially lower than permitted by that law, to which the validity of the loan contract is referred by its own terms and by the law of California.

## ARGUMENT.

### I.

### The Judgment Is Final, Since on "the Entire Record [and] Resort to the Local Law" [Richfield Oil Corp. v. State Board, 329 U.S. 69] There Was Nothing More to Be Decided in the State Courts.

1. The facts bearing upon the sole issue involved and decided by the highest state court to which the question could be taken, were conclusively established by admissions in the pleadings. [*Juris. State.*, par. 3, pp. 5-7.] In *Richfield Oil Corp. v. State Board, supra,* 329 U.S. 69, they were so established by a stipulation of the parties. Seizing upon that immaterial difference appellee asserts that this Court "carefully" made just that distinction in *Richfield* and that, therefore, the decision is inapplicable here. [*Mo.* 4 (note 4), 10.] *No such distinction was made in the case.* It could not have been made consistently with the rationale of the decision.

The significance of the stipulation in *Richfield* was that it conclusively established the facts for all purposes thereafter in the case. Because it had done so, and because the State's highest court had "passed on the issues which control the litigation . . . there [was] nothing more to be decided . . ." [329 U.S. at 73-74.] In the case at bar the admissions in the pleadings accomplished exactly the same purpose as did the stipulation in *Richfield*—they conclusively established the facts for

all purposes of the case thereafter.[2] [*Juris State.*, 5 (note 2), 10.] Because they did so establish the facts, they had "at least the force and legal effect of a stipulation of fact . . ." [*Juris. State.*, 10.]

Appellee's reply to this statement by us [*Mo.*, 10] misses or evades the substantive point; and depends on reading into *Richfield* a distinction and, therefore, an implied holding that were not made. It follows that the case at bar is directly within and controlled by the rationale and holding of *Richfield*.[3]

2. So far as the doctrine of "law of the case" is involved in the reasoning leading to the conclusion that the lower court's decision left nothing more to be de-

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[2]Appellee, citing *Perez v. Perez*, 111 Cal. App. 2d 827, 828-829, 245 P. 2d 344, 345, says, "even if the pleadings did conclusively establish the facts pleaded, this would not conclude the trial court's inquiry into additional facts . . ." [*Mo.*, 10.] The cited case does not support or even faintly intimate support of the quoted assertion. What was there considered and decided had nothing at all to do with the effect of an admission in the pleadings. What was decided was that in hearing a motion — for which, in California, the evidence is usually presented by affidavits [*Fuller v. Lindenbaum*, 29 Cal. App. 2d 227, 230, 84 P. 2d 155, 157] — the court may, if it so desires, receive other forms of evidence, *i.e.*, oral testimony from witnesses personally present in court.

[3]*Richfield* was not the only decision of this Court cited by us in support of jurisdiction. [*Juris. State.*, 3, 9-10.] Appellee maintains complete silence about the others. Yet they, equally with *Richfield*, show that on the whole record the judgment here is final for appellate purposes.

Similarly, appellee does not deny that an admission of a fact in the pleadings conclusively establishes the fact. [See, *Juris. State.*, 5 (note 2).] The fact that, conceivably, leave to amend the pleadings may be granted [*Mo.*, 10] does not change the effect of the admission. Such leave could also have been obtained with respect to the stipulation in *Richfield*, as this Court noted. [329 U.S. at 73 (note 1).] Nonetheless, the judgment was held to be final.

cided [*Juris. State.*, 10-11], one of appellee's counters is that the doctrine is inapplicable because the purpose of a preliminary injunction is only to preserve the *status quo* and does not involve final determination of the ultimate issue in the case. [*Mo.*, 4-7.] The contention is not borne out by the cases appellee cites; and it is, in fact, directly contrary to a controlling decision of the State Supreme Court. [*Moulton v. Knapp*, 88 Cal. 446, 447, 26 Pac. 210. See, also, *Hirsch v. San Francisco*, 143 Cal. App. 2d 313, 317-318, 300 P. 2d 177, 180-181.] As the two cases just cited show —especially *Moulton*—when an issue of law is decided on an appeal from the granting or denial of a preliminary injunction, the decision is the law of the case in respect of that issue whenever on the same facts it reappears; and when it does reappear the decision must be followed.

The case vouched to appellee's support in this connection—*Paul v. Allied Dairymen, Inc.*, 209 Cal. App. 2d 112, 25 Cal. Rptr. 595—is very much different. There, upon a hearing of a motion for a preliminary injunction the trial court erroneously reached beyond the only matter before it and attempted to decide the case finally on the merits. Obviously, that has nothing to do with the law of the case. The dicta in the opinion about the effect, upon the ultimate rights of the parties, of the determination of the application for a case, are beside the point in a case, such as the one at bar, where it is an *appellate* decision that is relied upon.[4]

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[4]Law of the case deals only with the effect in subsequent proceedings of a decision of an appellate court upon review of some ruling or determination in the case. It does not deal with the effect in the trial court phases of the case, of some earlier ruling by the trial court. [*Lawrence v. Ballou*, 37 Cal. 518, 521; *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 326, 283

Appellee's argument is based on the untenable assumption that the *only* purpose of a preliminary injunction is to preserve the *status quo*. That, to be sure, is its usual purpose; and it is generally assumed to be the purpose "in the absence of any record of the court's reasons" for issuing it. [*French Art Cleaners v. State Board,* 91 Cal. App. 2d 890, 896-897, 206 P. 2d 25, 28.] At bar, however, we have a "record of the court's reasons" — the opinions of the trial and appellate courts. [*Juris. State.,* Appendices "A" and "B".] In each of these there will be found no point discussed or decided other than the Commerce Clause issue. Neither court purported or intimated that its decision granting or affirming the granting of the injunction was based upon any purpose or intention to maintain the *status quo*. It was based, in each instance, on a determination that the statute sought to be applied was constitutional. [See, *Juris. State.,* Appendices "B" and "C", pp. 1-10, *passim.*] It is not unusual or improper in California to make the outcome of a preliminary injunction depend on the ultimate issue in the case. [See, *Brock v. Superior Court,* 12 Cal. 2d 605, 86 P. 2d 805.]

More importantly, preservation of the *status quo* could not have been the purpose of the injunction in the instant case. Its intended purpose and actual effect was to *change* the *status quo* by compelling Fairfax to

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Pac. 298, 309.] That is why the decision in the trial court of an application for a preliminary injunction does not settle any issue then decided, or preclude the possibility of a further or different decision in later stages of the case in that court. The decision of an appellate court upon an issue, however, settles the law for that issue throughout the rest of the case. The situation at bar is of the latter variety.

cease a substantial part of the interstate business it was then, and for several years had been, carrying on.[5]

3. As one ground of unconstitutionality, Fairfax pleaded the statute's failure to provide for notice or an opportunity to be heard before a cease and desist order could be issued. [*Clk. Tr.*, p. 18, lines 9-15; *Mo.* 8.] The determinative or controlling effect of the Commerce Clause ground is not, however, affected by that additional ground. In the first place, the ground was not urged in or entertained or decided by any of the courts below. [See, appellant's briefs filed in the courts below, *passim*; and the opinions below, *passim* [*Juris. State.*, Appendices "A" and "B", pp. 1-10.] In the second place, the statute provides for notice and an opportunity to be heard promptly after an order is made. [*Cal. Fin. Code*, sec. 24607; *Juris. State.*, Appendix "D", p. 15.] That complies with the requirements of due process. [*American Sur. Co. v. Baldwin*, 287 U.S. 156, 168; *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 31; *Phillips v. Commissioner*, 283 U.S.

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[5]That preservation of the *status quo* is not the only purpose is shown by the fact that in California it is no objection to a preliminary injunction that for the period of its duration it awards the complete or permanent injunctive relief the plaintiff seeks on the merits of the cause. [*Elsis v. Evans*, 157 Cal. App. 2d 399, 408, 321 P. 2d 514, 520; *Family Record Plan, Inc. v. Mitchell*, 172 Cal. App. 2d 235, 246-247, 342 P. 2d 10, 17-18.] It is further shown by the fact that a preliminary injunction may be mandatory in form and effect, thus compelling a change of the *status quo*. [*Piper v. Hawley*, 179 Cal. 10, 19, 175 Pac. 417, 421; *Pacific Gas & Elec. Co. v. Minnette*, 115 Cal. App. 2d 698, 708-709, 252 P. 2d 642, 648; *Johnson v. Superior Court*, 65 Cal. 567, 4 Pac. 575.] Actually, an important, if not the most important function of a preliminary injunction is to prevent irreparable injury *pendente lite*, the accomplishment of which purpose may or may not involve preserving the *status quo*. [See, *E. H. Renzel Co. v. Warehousemen's Union*, 16 Cal. 2d 369, 372-373, 106 P. 2d 1, 2-3; *Schwartz v. Arata*, 45 Cal. App. 596, 601, 188 Pac. 313, 315.]

589, 596.] And, even without that, the opportunity, which is accorded, to defend against a cease and desist order in a plenary action such as the instant one, is due process. [*Cf., Bianchi v. Morales,* 262 U.S. 170; *Phillips v. Commissioner, supra,* 283 U.S. at 595.] Even if that were not so, the statute's defect in the respect alleged would not make its licensing provisions inapplicable; at most it would simply invalidate the administrative cease and desist order.

It follows, that even if the notice point had been urged it would not have eliminated the Commerce Clause question or the necessity of deciding it. If the statute were held constitutional under that Clause, the admitted facts being what they are, an injunction exactly like the one that was issued would have to be issued notwithstanding the notice defect. Thus, the controlling question in the case would still be the Commerce Clause question. And upon that question the law of the case, as established by the judgment here involved, would be conclusive in the State courts, and compel a decision of that question in favor of the statute's constitutionality and the consequent issuance of an injunction. [*Moulton v. Knapp, supra,* 88 Cal. at 447, 26 Pac. 210; *Steelduct Co. v. Henger-Seltzer Co.,* 26 Cal. 2d 634, 642-643, 160 P. 2d 804, 808-809.]

Clearly, the Commerce Clause question was and is the basic issue in the case. The facts on the issue were all before the courts below. The question of law raised by that issue is dispositive of the case upon the same facts; and it has been passed upon by the highest state court to which it could be taken. That is enough to establish finality.[6]

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[6]Appellee refers to a due process contention based upon *Allgeyer v. Louisiana,* 165 U.S. 578, and *State Board of Equali-*

## II.

## California's Effort to Uphold a Right to Determine Who May Engage in Interstate Commerce, in the Face of Exactly Contrary Decisions From This Court, Proves the Question Is Substantial.

1. Appellee's argument directed at the substantiality of the question is nothing more than an emotional plea for regulation of the small loan business to protect the "public from fraud, deceit and sharp practices." [*Mo.*, 12-15, 21.] It wholly evades the real issue in this case. That issue is not whether a State has the power to engage in such regulation, even in respect of the local incidents of an interstate lending business. There is not a single word in the complaint filed by appellee that tenders any issue in that regard or any issue of violation by appellant of local regulations applicable to it.[7] The issue here goes to a deeper and from the national standpoint at least, a more important question—which sovereign, Nation or State, shall determine who may engage in interstate commerce? The need,

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*zation v. Young's Market*, 299 U.S. 59. [*Mo.*, 9.] That was not an original contention in the cause or part of appellant's pleaded defense of unconstitutionality. It came into the case in rebuttal to appellee's irrelevant argument that regulation of the lending business was a valid exercise under the due process clause of the State's police power. It was designed to show that appellee's due process discussion was incomplete. [See, *Appellant's Closing Brief*, pp. 36-37, in the court below.] The reference to that proposition in the Petition For Hearing in the Supreme Court, pp. 23-24, was made for the same purpose and to show that in taking up appellee's contention the District Court of Appeal's discussion was similarly incomplete.

[7]Accusations of such violation, not made in the pleadings, not litigated below, and not litigable in this case, because not pleaded, are made in the Motion to Dismiss. [*Mo.*, 13-14.] The accusations are without merit, as we shall show. [See, Appendix, *infra.*]

or lack of need for regulation of the interstate lending business has nothing to do with that question.

The Congress cannot be assumed to be incapable of governing or to be oblivious to the country's needs, or those of the States in respect of a matter exclusively within the national control. In the past it has shown that it knows how to meet its responsibilities in these respects, either by itself enacting needed legislation to protect the public from fraud, deceit or sharp practices in interstate trade;[8] or by giving the States permission to act. [See, note 9, *infra.*]

Without that permission the States are powerless to control entry into or engagement in interstate commerce, although they have the power to regulate the local incidents of the commerce. If the Congress, as the sole custodian of national legislative policy, does not act, its failure or inertia does not clothe the States with a power denied them by the constitution. The Federal-State relationship not infrequently prevents a State from doing as it would like to do in matters confided by

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[8]Among a considerable number of such regulatory statutes, in many of which there are licensing provisions, the following are illustrative: *Securities Act of 1933,* 15 U.S.C., ch. 2A, beginning with §77a; *Securities Exchange Act of 1934,* 15 U.S.C., ch. 2B, beginning with §78a; *Investment Companies Act,* 15 U.S.C., ch. 2D, beginning with §80a-1; *Weights and Measures,* 15 U.S.C. ch. 6, beginning with §231; *Natural Gas Act,* 15 U.S.C., ch. 15A, beginning with §715; *Commodity Exchange Act,* 7 U.S.C., ch. 1, beginning with §1; *Cotton Standards Act,* 7 U.S.C., ch 2, beginning with §51; *Grain Standards Act,* 7 U.S.C., ch. 3, beginning with §71; *Packers & Stockyards Act,* 7 U.S.C, ch. 9, beginning with §181; *Warehouse Act,* 7 U.S.C., ch. 10, beginning with §241; *Perishable Agriculatural Commodities Act,* 7 U.S.C., ch. 20A, beginning with §499a; *Meat Inspection Act,* 21 U.S.C., ch. 4, beginning with §71; *Virus, Serum and Toxin Act,* 21 U.S.C., ch. 5, beginning with §151; *Food, Drug & Cosmetic Act,* 21 U.S.C., ch. 9, beginning with §301.

the constitution to the national government.[9] That is the price the State must pay for being a part of the Union. It cannot, because of impatience or dissatisfaction with Congressional charting of national policy, interpose its own sovereignty or legislation, thus seceding *pro hac vice* from the responsibilities of the Constitution of the United States. [*Cf., Cooper v. Aaron,* 358 U.S. 1, 17-19; *United States v. Louisiana,* 364 U.S. 500.]

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[9]For example, long before the 18th Amendment or the Volstead Act several States had prohibited the sale or possession of liquor; but they were powerless to stop the importation of the prohibited beverage in interstate commerce from other States [*e.g., Bowman v. Chicago etc. Ry. Co.,* 125 U.S. 465; *Leisy v. Hardin,* 135 U.S. 100], until Congress consented to their doing so. [Act of Aug. 8, 1890, c. 728, 26 Stat. at L. 313; Act of Mar. 1, 1913, c. 90, 37 Stat. at L. 699.] States adopting so-called "Fair Trade" price-fixing as a desirable policy, had to suffer price-cutting on goods in interstate commerce, until Congress consented to making the State legislation applicable to such goods. [15 U.S.C. §1.] So, too, after insurance had been declared to be a commodity in interstate commerce, extensive state licensing and regulation of the business was consented to by Congress. [15 U.S.C., §§1011-1015.] States whose public policy banned price-fight films as detrimental to public morals could not keep them out when imported in interstate commerce, until Congress had consented. [15 U.S.C., §1001.]

The States may not, by their local law of unfair competition give exclusivity to a design that under the patent laws is in the public domain, because to do so would be contrary to the national policy evinced by the patent and copyright clause. [*U.S. Const.,* art. I, sec. 8, cl. 8; *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225; *Compco Corp v Day-Brite Lighting, Inc.,* 376 U.S. 234.] They may not create or recognize a cause of action for libel that infringes rights protected by the First Amendment [*New York Times Co. v. Sullivan,* 376 U.S. 254.] Because of the coinage clause, they may "no longer declare what shall be money or regulate its value . . ." [*Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 545; *U.S. Const.,* art. I, sec. 8, cl. 5.] And, of course, a great deal of regulatory activity is closed to the States by the First and Fourteenth Amendments. [See, *e.g., Griswold v. Connecticut* (June 7, 1965) ..... U.S. ....; *Brown v. Board of Education,* 347 U.S. 483; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393.]

It is the meaning of the Commerce Clause, though appellee disregards it, to bring to an end the interposition into the nation's policy by the States of their own ideas of what is good for the country's commerce. It is a meaning felicitously expressed by Mr. Justice Holmes in a much quoted passage when he said:

> ". . . I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to en." [Holmes, *Collected Legal Papers* (Harcourt, Brace and Howe, 1920) pp. 295-296.]

Appellee's position historically is not a new one. When decisions limiting what some thought were the rights of the States over corporations doing an interstate business were first handed down [*e.g., Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489; *Leisy v. Hardin, supra,* 135 U.S. 100; *Western Union Tel. Co. v. Kansas,* 216 U.S. 1; *International Textbook Co. v. Pigg, supra,* 217 U.S. 91] there were the usual cries of havoc and predictions of doom. [See, Warren, *The Supreme Court In United States History* (Little, Brown & Co., 1935) vol. II, pp. 631-697, 717-718. And generally, for similar reactions to almost any decision that interfered with unlimited and uncontrolled activity by the States in pursuit of a parochial rather than a national policy, see *Op. Cit.*, vol. I, pp. 92-102, 506-509, 514-525, 541-559, 616-621, 690-699, 715-

723, 753-761, 768-773; vol. II, 540-546, 578-584, 626-631, 650-651, 697, 717-718.] The transient agitation produced by such decisions has never influenced this Court to permit the States to do "what the Commerce Clause was meant to end."

The commerce question here is made substantial by the very fact that California through its Attorney General claims and the State courts have upheld a right to legislate in a way that will prevent entry into interstate commerce without the State's permission; the right, in short to do "what the Commerce Clause was meant to end." [See, *Brown v. Maryland,* 12 Wheat. 419, 445-449; *Gibbons v. Ogden,* 9 Wheat. 1, 196-199; *Polar Ice Cream etc. Co. v. Andrews,* 375 U.S. 361, 374-375; *Leisy v. Hardin, supra,* 135 U.S. at 125.]

2. Appellee's discussion of substantiality is really a discussion, not of that subject, but of the merits of the ultimate issue in the case. As such it is mainly based on *Robertson v. California,* 328 U.S. 440, which, appellee says "irreparably fractures" the unbroken line of license cases that establish the rule upon which we rely, and which were referred to by this Court in *Crutcher v. Kentucky,* 141 U.S. 47, and also recently approved in *Lilly & Co. v. Sav-On Drugs,* 366 U.S. 276, 278.

Appellee quite correctly says that in *Crutcher,* this Court "held invalid a Kentucky statute requiring a license in order to do an interstate express business . . ." [*Mo.,* 15.] Yet, it does not stop to explain why there is no substantial question raised by a directly contrary holding from a State court bound to accept this Court's interpretation of the constitution as the supreme law of the land. [*Cooper v. Aaron, supra,*

358 U.S. at 18.] Appellee does stop, however, to complain of our "wrenching" of a "dictum" from *Crutcher* out of context — a complaint that has no basis in fact.[10] [*Mo.*, 15-16.] No doubt, as appellee points out, *Crutcher* was decided in 1891. But as late as 1961 this Court in *Lilly & Co. v. Sav-On Drugs, supra,* 366 U.S. at 278, expressed its satisfaction with the rule, expressly citing among others, *Crutcher* and *International Textbook.*

But, appellee argues, this "unbroken line of decision" referred to in *Crutcher* and reaffirmed in *Lilly* has been "fractured irreparably" by *Robertson v. California, supra,* 328 U.S. 440. [*Mo.*, 16.] Strangely enough when, only a few years after *Robertson,* this Court decided *Lilly* in reliance upon the "well established" line of decision exemplified by *Crutcher* it did so even though *Robertson* was cited in the *Lilly* briefs. Obviously, this Court did not think that *Robertson* had "fractured" that well established line.

3. We have anticipated in part [see *Juris. State.*, 13-14] appellee's reliance on *Robertson.* It is not in fact an interstate-business license case but one of local regulation. Consideration of the *Robertson* opinion in exploration of this assertion must be divided into two parts in addition to the one suggested in the *Jurisdiction-*

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[10]Appellee is not specific, but very likely it refers to the short quotation from *Crutcher* at page 11 of the Jursidictional Statement. The "context" in which the quoted excerpt appears in the opinion is a discussion and approval of the proposition that if the matter were within the State's jurisdiction, the licensing requirement there involved might "be promotive of the public good . . ."; but interstate commerce is a Federal right exclusively within the national jurisdiction, into which the States cannot encroach by requiring a license to carry on such commerce [141 U.S. at 56-57.] Our quotation accurately reflects that context.

*al Statement,* pages 13-14. The first part was concerned with the question whether the State may require a license of an insurance broker or agent, carrying on his business wholly within the licensing State but who, at least on occasion,[11] had some contact with interstate trade, such as following up a mail solicitation and urging the addressee to apply for a policy. The agent was not otherwise in interstate commerce. This Court held that the State had an interest in "his *localized* pursuit of this phase of the comprehensive process of conducting an interstate insurance business. . ." [328 U.S. 448-449. Italics ours.] It was held, however, that this pursuit was not such as to put the agent himself in the position of being in or substantially affecting interstate commerce. Consequently, there was no bar from the Commerce Clause to the State's requirement of a license of the agent. [328 U.S. at 444-445, 447-451.]

Of the decisions cited in support of that holding, a typical one is *Hartford Acc. & Indem. Co. v. Illinois,* 298 U.S. 155, 157-158. As the following excerpt from the opinion in that case shows, the thrust of the discussion there, and so in *Robertson,* is at regulation of local phases of commerce, not at the power to license engagement in it:

> ". . . The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from

[11]It does not appear in the report of the case whether the agent who was prosecuted did any work other than of the kind for which he was accused of violating the license statute. [See, *Lilly & Co. v. Sav-On Drugs, supra,* 366 U.S. at 278-279.]

> points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article 1, §8, of the Federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective." [298 U.S. at 157-158.]

The difference from the case at bar, in which the sole question is power to license engagement in interstate commerce, is obvious.[12] Here, the effect of exercise of the State's licensing power upon interstate commerce is direct and substantial, embracing as it does the power to stop it altogether — a power which the State has so far effectively exercised against Fairfax.

The second part of *Robertson* was concerned with the prohibition against brokers and agents in the State acting for "nonadmitted" insurers, and its effect upon interstate commerce. The insurer there involved had declined to comply with the State's minimum reserve requirements, imposed upon all insurers alike for the protection of policyholders in the State. While the argument apparently traversed a wider range [see 328 U.S. at 452], this Court construed the question presented to be, and the question at which its discussion was directed was, whether "California, as a result of

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[12]Two of the cases upon which the Court relied in this connection — *Union Brokerage Co. v. Jensen*, 322 U.S. 202, and *California v. Thompson*, 313 U.S. 109 — are also cited by appellee at bar. [*Mo.*, 18, 19.] They are distinguishable in the respect here under discussion on the same ground as *Robertson*.

the Southeastern decision, no longer can require foreign insurance corporations seeking to do business there to maintain minimum reserves for protection of policyholders in the state or compel agents or brokers to refrain from representing them there notwithstanding such noncompliance." [328 U.S. at 455-456.] It was in that discussion that there was talk about excluding commerce, and from which appellee culls the excerpt it quotes at pages 17-18 of its Motion.

The difference between that question and the one involved at bar is illustrated by the cases upon which the *Robertson* holding was made to depend. They were the "quarantine" cases, of which *Rasmussen v. Idaho,* 181 U.S. 198, is typical. There a statute banned the bringing into Idaho of sheep from areas in other states which the Governor had found and proclaimed to be areas in which there were epidemic conditions rendering sheep from those areas to be likely to convey disease in Idaho. It was held valid. Before that, a somewhat similar statute in Missouri barring, for eight months of each year the importation of Texas, Mexican or Indian cattle, had been invalidated in *Railroad Company v. Husen,* 95 U.S. 465. This Court's distinction of *Husen* in *Rasmussen,* serves to indicate the distinction between the instant case and *Robertson.* The Court in *Rasmussen* said:

> "It will be perceived that the act [in *Railroad Co. v. Husen*] was an absolute prohibition operative during eight months of each year. It was an act continuous in its force; provided for no inspection, and was predicated on the assumption that the State had the right to exclude for two thirds of each year the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.

> "In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to the scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the state sheep inspector, to be necessary." [181 U.S. at 201.]

In *Robertson* this Court noted that what was involved was imposition of reserve standards upon all companies doing or seeking to do business within the State [328 U.S. at 458], and that this was in effect local regulation against fraudulent and unsound insurance. [328 U.S. 460.] That brought the case within the ambit of *Rasmussen* and similar "quarantine" cases. It was in this connection that the Court said that use of the word "license" did not *per se* condemn "state regulation of interstate business done *within* the State's borders . . ." [328 U.S. at 458. Italics ours.] The thrust of the discussion strikes at the power of local regulation, not at the power to control the Federal right of engaging in interstate commerce.

4. Notwithstanding that no issue was tendered respecting, nor any effort made below to enjoin, alleged violations of the local regulatory provisions of California's statute, appellee makes some references to some such alleged violations in respect of Fairfax's loan charges and its solicitation letter.[13] [*Mo.*, 13, 14.]

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[13]We need not interrupt the argument of substantiality to discuss these irrelevant charges. We discuss them, therefore, in an Appendix to this brief.

If there were any local violations of any part of the statute fairly applicable to Fairfax, appellee's remedy was clear. It could have proceeded administratively or sued, to compel cessation of the alleged violative practices.[14] [*Cal. Fin. Code,* secs. 24607, 24608; *Juris. State.,* Appendix "D", pp. 15-16.] It did not do so. It limited both its administrative proceeding [ Clk. Tr. p. 6] and its suit entirely to the failure to get the State's license to do business at all. [*Juris. State.,* pars. 1-3, pp. 4-7.] The irrelevancy to any issue in the cause, and, *a fortiori,* to the question of substantiality, of the present belated effort to inject these matters into the case is patent upon the face of the record.

Furthermore, the loan charges are not violative but lawful; and the assertion that there is a "misleading assurance" in the solicitation letter [*Mo.,* 13-14] is even more misleading than the quoted "assurance." [See, Appendix, *infra.*]

The sum of appellee's argument in the present proceeding is that in its view the court below was right in ultimate result. That is not an argument touching the substantiality of the question, unless it is so clear that the lower court was right that there cannot be any reasonable debate about it. [See, *Zucht v. King,* 260 U.S. 174, 176-177.] Clarity to that degree of certainty, however, is wanting, for *Crutcher, International Textbook, Lilly* and the many other cases like them, make the correctness of the decision below at least fairly debatable, if they do not indeed demonstrate conclusively how wrong that decision is. That is sub-

[14]As the event of the present action shows, there would be no difficulty in obtaining the necessary order for service of process upon Fairfax. [*Clk. Tr.,* pp. 8-12.]

stantiality. [See, *United States v. Tod,* 264 U.S. 134, 135-136.] The necessity of reconciling the opposing arguments and the separate lines of decision upon which those arguments respectively depend is not a task for summary disposition; especially so when the subject matter and its historic and omnipresent importance to the federal structure are taken into account.

**Conclusion.**

The motion to dismiss should be denied, and probable jurisdiction noted.

Respectfully submitted,

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